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C O N F I D E N T I A L SECTION 01 OF 03 THE HAGUE 002107

SIPDIS

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E.O. 12958: DECL: 1.6 FIVE YEARS AFTER CLOSURE ICTY

TAGS: [BK](#) [HR](#) [KAWC](#) [NL](#) [PHUM](#) [PREL](#) [SR](#) [ICTY](#)

SUBJECT: ICTY: CHIEF PROSECUTOR AND PRESIDENT PUSHING IN
OPPOSITE DIRECTIONS ON DRAFT SECURITY COUNCIL RESOLUTION

REF: A. (A) STATE 230045

[1](#)B. (B) STATE 237615

[1](#)1. (U) Classified by Clifton M. Johnson, Legal Counselor,
for reasons 1.5(D) and 1.6.

[1](#)2. (C) Summary. International Criminal Tribunal for the
former Yugoslavia (ICTY) Chief Prosecutor Del Ponte and
President Meron are pressing for competing changes in the
draft ICTY/ICTR Security Council resolution under
consideration. Del Ponte, who is circulating to all fifteen
Security Council members a position paper with respect to the
draft resolution (see para 7), is urging that constraints in
the draft text with respect to prosecutorial functions be
softened and that flexibility be preserved for the Office of
the Prosecutor (OTP) in implementing the completion strategy.
Meron, who is looking ahead to the possibility that the
Chambers may be called upon to enforce implementation of the
completion strategy if the OTP fails to show the necessary
discipline, is seeking stricter and operative language with
respect to the Security Council's expectations so as to
provide him with the necessary authority to deal with any
indictment requests submitted by the OTP that are
inconsistent with the strategy. The latest draft resolution
text (see ref B) will likely allay a number of Del Ponte's
concerns while limiting the scope of any potential
enforcement role by Meron. End summary.

[1](#)3. (C) Jean-Daniel Ruch, the Political Adviser to Chief
Prosecutor Del Ponte, met with Embassy Legal Counselor on
August 19 to convey a seven point "position paper" reflecting
Del Ponte's views on the draft ICTY/ICTR Security Council
Resolution (SCR) under consideration. (Summary of paper at
para 4; full text at para 7). Ruch noted that he had been
instructed to make a similar demarche to the fourteen other
Security Council members and that parallel demarches were
being made or faxed to missions in New York. It became clear
from the discussion that Del Ponte has obtained a copy of the
draft SCR circulated by the U.S. o/a August 8 (see Ref A).
The points in the position paper react to that draft vice the
revised draft of August 15 contained in ref B.

[1](#)4. (C) Del Ponte's critique of the draft resolution
focuses on issues of prosecutorial independence. Her
position paper notes that "language aimed at restricting
unduly the powers of the Prosecutor is unnecessary and is
open to criticism as being improper interference with the
Prosecutor's independence and the exercise of her
discretion." The paper further objects to any attempt to
limit the independence of the prosecutor on grounds of
principle. Ruch explained that constraints in the ICTY
context could set a bad precedent for similar Security
Council steps with respect to other international criminal
tribunals, clearly referring to the International Criminal
Court. The paper also notes that such limitations will
"seriously impede the prosecution strategy" because they
would eliminate the "essential credible threat" of
prosecution that the OTP uses to obtain the cooperation of
insider witnesses. Finally, the paper cautions that it
"would be counterproductive to start transferring cases
immediately" to local jurisdictions until such jurisdictions
can adequately protect witnesses and function in accordance
with international standards. Further, any transfers must
not unduly prolong pre-trial detention.

[1](#)5. (C) Ruch elaborated that Del Ponte had particular
concerns with language in the draft resolution (a) providing
that "cases involving those (not at the most senior levels)
... should be transferred to competent national
jurisdictions; (b) underlining that "issuing additional
indictments ... would be incompatible with achieving the
objectives of the Completion Strategy"; (c) "calling on the
Prosecutor and the Presidents of the ICTY and the ICTR, in
their annual reports to the Council, to explain their plans
including the number of additional final indictments that
might be sought...." (d) that "urges the ICTY ... to take
steps to transfer cases"; and (e) creating a separate
prosecutor for the ICTR. Legal Counselor noted that the
draft continued to be worked in New York and that further
revisions were likely with respect to the text that was the

basis for the OTP comments. Ruch welcomed the news that the text remained in play and encouraged the USG to share any new version with the OTP.

16. (C) ICTY President Meron, a vigorous and strong proponent of the completion strategy, is pressing from the opposite direction. Meron, who was also reacting to the earlier SCR text in ref A, expressed concern that language relating to the need to focus prosecution on senior levels and transfer other cases to domestic jurisdictions was in the preambular rather than operative part of the resolution. Similarly, Meron preferred to make operative language calling on the Presidents of the ICTY and the ICTR to "use their best efforts to ensure that the objectives of the Completion Strategy are achieved." Meron acknowledged legal counselor's point that the language, even if preambular, provided a clear statement of the Security Council's view of what the Tribunal should be doing. He also noted that some authority was provided through this language in conjunction with the operative paragraph urging the ICTY and ICTR to take steps to transfer cases to national jurisdictions. (Note: This language has been deleted from the text provided in ref B. End note).

17. (U) Begin Text of Del Ponte Position Paper on draft UNSCR

August 19, 2003

POSITION PAPER

Having been informed of the contents of a draft Security Council resolution being currently under considerations by its members, the Prosecutor would like to draw the attention of the representatives to the following important issues:

1. Independence of the Prosecutor. In accordance with the Statute of the Tribunal (article 16(2)), the Prosecutor enjoys the sole discretionary right to conduct investigations and issue indictments. The Prosecutor has committed herself in various instances, the most recent on 8 August before the Security Council, to strictly respect the timetable put forward in the completion strategy, this in close co-operations with the President of the Tribunal. As a consequence, language aimed at restricting unduly the powers of the Prosecutor is unnecessary and is open to criticism as being improper interference with the Prosecutor's independence and the exercise of her discretion.

2. While it is a positive step to recall expressis verbis the 23 July 2002 Presidential statement, any attempt to limit the independence of the Prosecutor is unnecessary, both for reasons of principle and because it will seriously impede the prosecution strategy, thereby creating obstacles to the smooth implementation of the completion strategy. In particular, limiting additional indictments, except in certain specific cases, would actually prejudice the Prosecutor's ability to complete the remaining investigations and prosecutions. Far from being incompatible with the completion strategy, issuing certain new indictments will serve to achieve that objective. The proposed limitations contained in the draft resolution would not only put at risk the efficient implementation of the completion strategy, but worse, they would also operate against the prosecution of leadership cases.

3. The efficient and successful prosecution of top leaders largely depends upon obtaining the evidence of insider witnesses, whose cooperation cannot be obtained unless they perceive themselves to be facing a real risk of immediate prosecution. This essential credible threat of prosecution would be removed by imposing any absolute bar to new indictments. In practice the co-operation of insiders who have themselves committed serious violations of international humanitarian law, is often inextricably linked to pleas of guilty, so that the issuing of indictments against individuals does not in fact result in trials. An absolute prohibition on issuing new indictments would also create technical legal difficulties where issues of separation and joinder of trials arise, or where re-trials are ordered on appeal, or where crimes are committed against the course of justice in ongoing prosecutions.

4. The completion strategy being a joint endeavour of all three pillars of the Tribunal, their three heads (President, Prosecutor, Registrar) should be made responsible for achieving its objectives within the given timetable. For reasons of principle, a hierarchy can not be created between these three top functions.

5. A logical and indispensable component of the completion strategy is the transfer of cases to the various domestic jurisdictions. However, it would be counter-productive to start transferring cases immediately, even before these national courts are functioning in accordance with international standards. In particular, sensitive information concerning potential witnesses cannot responsibly be transmitted until domestic jurisdictions have the capacity to put in place proper measures for witness protection. Nor can accused be transferred when they have already spent a substantial time in ICTY custody and the domestic

jurisdiction has no prospect of bringing them to trial within a reasonable period. The effect of transfer must not be to prolong pre-trial detention unduly.

16. In the transition process to the effective domestic prosecution of war crimes, the Tribunal has an important part to play. For the Prosecution, working methods will have to be further elaborated regarding the transfer of documentation and evidence. Also, it would be essential to consider international monitoring, as well as advising mechanisms. Other aspects have to be dealt with, in particular by the Outreach programme of the Registry.

17. Regarding the appointment of a separate Prosecutor for Rwanda, the current Prosecutor had made her views clear in her statement to the Security Council on 8 August. The belief that a new prosecutor would enhance the ICTR's efficiency does not withstand deeper analysis. Moreover, such a decision would send a strong political signal justifying the efforts of political bodies to exert pressure on the international criminal justice system. This would undoubtedly create a dangerous precedent for the future. The Prosecutor would like to kindly ask the representatives to consider these most essential elements when drafting the resolution. She remains available for any further information or comment.

End text of Del Ponte Position paper on UNSCR.

18. (C) Comment. Del Ponte and Meron are, predictably, approaching the draft SCR from different perspectives. Del Ponte wants to ensure that she retains broad prosecutorial discretion and that her position is not further eroded. She also raises a legitimate point about the need for OTP to be able to retain a credible threat of prosecution against lower level targets so as to prompt their cooperation. Meron is committed to the completion strategy but needs the SCR to provide clear legal and political authority if he is to play the role of enforcer. The more robust the text of the resolution, the more likely Meron is to feel comfortable in directing the Chambers to reject OTP indictments sent for confirmation that do not meet the standards laid out by the Security Council or to use his authority to transfer lower level cases for trial in domestic courts. If the language on these points is softened, Meron is more likely to take the route of reporting his concerns about such indictments to the Security Council rather than actually rejecting or transferring such cases.

19. (C) Comment continued. The text of the revised resolution conveyed in ref C, because it softens or eliminates some of the provisions discussed above, will likely assuage a number of Del Ponte's concerns while making it less likely that Meron will feel comfortable taking aggressive steps to impose the completion strategy on the OTP. Much depends on Del Ponte: if she makes a sustained and effective effort to implement the completion strategy, then it becomes much less important whether and to what degree we could expect Meron to play an enforcing role. End comment.

SOBEL